2018

Section 1: Moot Court: Nieves

Institute of Bill of Rights Law at The College of William & Mary School of Law

I. Moot Court: *Nieves*

Nieves v. Bartlett

Ruling Below: *Nieves v. Bartlett*, 712 Fed.Appx. 613 (9th Cir. 2017)

Overview: Bartlett sued under § 1983 claiming that the officers who arrested him for disorderly conduct and harassment had no probable cause for arrest. The arrest occurred at a party where the police officers, Nieves and Weight, interpreted Bartlett's body language as "hostile" resulting in his arrest and placement in the "drunk tank." Bartlett was charged with disorderly conduct and resisting arrest.

Issue: Whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983.

RUSSELL P. BARTLETT, *Plaintiff- Appellant*

v.

LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity, *Defendants-Appellees*

United States Court of Appeals, Ninth Circuit

Decided on October 20, 2017

[Excerpt; some citations and footnotes omitted]

Before WARDLAW, CLIFTON, and OWENS, Circuit Judges.

Plaintiff-Appellant Russell P. Bartlett appeals the district court's grant of summary judgment to Alaska state trooper Defendants-Appellees Luis A. Nieves and Bryce L. Weight on his § 1983 claims of false arrest, excessive force, malicious prosecution, and retaliatory arrest. We review the district court's grant of summary judgment de novo. *Garcia v. Cty. of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011). We affirm in part and reverse in part.

1. We affirm the district court's grant of summary judgment to the defendants on plaintiff's false arrest claim on the ground of qualified immunity. A two-part test applies to qualified immunity claims. Construing the facts in the light most favorable to the party alleging injury, the court must evaluate: 1) whether the officer violated a constitutional right; and 2) whether that right was clearly established at the time of the officer's actions. *See Lal v. California*, 746 F.3d 112, 116 (9th Cir. 2014) (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

Adopting Bartlett's version of the facts, we agree with the district court that defendants had at least arguable probable cause to arrest Bartlett for harassment, disorderly conduct, resisting arrest, or assault

under Alaska law. When Sergeant Nieves initiated Bartlett's arrest, he knew that Bartlett had been drinking, and he observed Bartlett speaking in a loud voice and standing close to Trooper Weight. He also saw Trooper Weight push Bartlett back. Although Bartlett may have his own explanations for his actions, these explanations were not known to Sergeant Nieves; the test is whether "the information the officer had at the time of making the arrest" gave rise to probable cause. *John v. City of El Monte*, 515 F.3d 936, 940 (9th Cir. 2008). We agree with the district court that it did; a reasonable officer in Sergeant Nieves's position could have concluded that Bartlett stood close to Trooper Weight and spoke loudly in order to "challenge" him, provoking Trooper Weight to push him back. *See* Alaska Stat. § 11.61.120(a)(1). Therefore, we affirm the district court's grant of summary judgment to the troopers on Bartlett's false arrest claim.

2. We affirm the district court's grant of summary judgment to the troopers on Bartlett's excessive force claim on the ground of qualified immunity. In particular, Bartlett has failed to point to a case that clearly establishes that the troopers' limited use of force to effect his arrest was unconstitutional. Bartlett's references to *Young v. County of Los Angeles*, 655 F.3d 1156 (9th Cir. 2011), and *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007), are unavailing. In the present case, the troopers reacted quickly to a fluid situation and were faced with the undisputedly challenging circumstances of Arctic Man. These circumstances were not present in *Young* and *Blankenhorn*. Because the second prong of the qualified immunity test requires "a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment," and we are not aware of any such case, we agree with the district court that the officers are entitled to qualified immunity on Bartlett's excessive force claim. See *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (instructing that clearly established law must be "particularized" to the facts of the case).

3. We also affirm the district court's grant of summary judgment on Bartlett's malicious prosecution claim. To prevail on his malicious prosecution claim, Bartlett must show that the troopers prosecuted him: 1) with malice; 2) without probable cause; and 3) for the purpose of denying him a specific constitutional right. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). Because we conclude that the officers had probable cause to arrest Bartlett, we affirm the grant of summary judgment to the troopers on this claim.

4. We reverse the district court's dismissal of Bartlett's retaliatory arrest claim. The district court dismissed this claim on the ground that the troopers had probable cause to arrest Bartlett. However, we have previously held that a plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest. *See Ford v. City of Yakima*, 706 F.3d 1188, 1195–96 (9th Cir. 2013) "[A]n individual has a right to be free from retaliatory police action, even if probable cause existed for that action.").

The Supreme Court's decision in *Reichle v. Howards*, 566 U.S. 658 (2012), does not foreclose this result. In *Reichle*, the Court noted that it had not previously recognized a First Amendment right to be free from a retaliatory arrest supported by probable cause, but did not conclude that a plaintiff must show lack of probable cause to make a retaliatory arrest claim. *Id*. at 664–65. Indeed, the Court emphasized that the rule that it announced in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that a plaintiff cannot make a retaliatory *prosecution* claim if the charges were supported by probable cause, does not necessarily extend to retaliatory arrests. *Reichle*, 566 U.S. at 666–70.

We have since clarified that in the Ninth Circuit, a plaintiff can make a retaliatory arrest claim even if the arresting officers had probable cause. When the troopers arrested Bartlett at Arctic Man in 2014, it was clearly established that "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action." *Ford*, 706 F.3d at 1195–96. Therefore, the district court erred in concluding that Bartlett's retaliatory arrest claim fails simply because the troopers had probable cause to arrest him.

Bartlett has potentially established a claim of retaliatory arrest in violation of the First Amendment because 1) he has "demonstrate[d] that the officers' conduct would chill a person of ordinary firmness from future First Amendment activity" and 2) the evidence that he has advanced would enable him "ultimately to prove that the officers' desire to chill his speech was a but-for cause of their allegedly unlawful conduct." *Id*. at 1193.

Regarding the first prong of the test, we have held that an arrest in retaliation for the exercise of free speech is sufficient to chill speech. *Lacey v. Maricopa Cty*., 693 F.3d 896, 917 (9th Cir. 2012). Regarding the second prong, we have held that, once a plaintiff has provided "sufficient evidence for a jury to find that the officers' retaliatory motive was a but-for cause of their action," "the issue of causation ultimately should be determined by a trier of fact." *Ford*, 706 F.3d at 1194. Construing the facts in the light most favorable to Bartlett, he has advanced sufficient evidence to meet this standard. Most importantly, Bartlett alleged that Sergeant Nieves said "bet you wish you would have talked to me now" after his arrest. This statement, if true, could enable a reasonable jury to find that Sergeant Nieves arrested Bartlett in retaliation for his refusal to answer Sergeant Nieves's questions earlier in the evening. We therefore conclude that the district court erred in granting summary judgment for the troopers on Bartlett's retaliatory arrest claim.

Each party to bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

“Supreme Court Trying Again on the First Amendment Retaliatory Arrest Question: The question that the Court didn't resolve in Lozman v. Riviera-Beach is back, in another case on which the Supreme Court just granted”

Reason

Eugene Volokh

June 28, 2018

This past Term's *Lozman v. Riviera-Beach* was expected to resolve a hugely important question: Can someone sue for retaliatory arrest if he there was probable cause to arrest him for some fairly petty crime, but there's lots of reason to think that he wouldn't have been arrested if it weren't for his past constitutionally protected speech? The Court resolved the case on very narrow grounds, limited to the rare cases where plaintiff can show a municipal policy of going after him because of his speech. But the Court just agreed to hear a new case, *Nieves v. Bartlett*, that involves the broader issue; the Court will presumably decide the question this coming year. Here are the facts of the case as described in the state's petition for certiorari:

Every spring, thousands of extreme skiers, snowmobilers, and spectators gather in the remote Hoodoo Mountains of interior Alaska for Arctic Man, a multi-day festival centered around a high-speed ski and snowmobile race. Campers congregate at night to drink and party, and rampant alcohol use compounds safety concerns at the event.

On the last day of Arctic Man in 2014, Troopers Luis Nieves and Bryce Weight were on duty, patrolling a large outdoor party where minors appeared to be drinking alcohol. Nieves encountered respondent Russell Bartlett at the party and attempted to speak with him, but Bartlett declined to talk to Nieves. Meanwhile, Trooper Weight spotted a minor who appeared to be drinking alcohol and began speaking to him at the edge of the crowd. Bartlett marched up to Weight, loudly demanding that Weight stop talking to the minor.

The district court, reviewing video footage of the incident, found that "Trooper Weight, Mr. Bartlett, and the minor [were] standing very close together exchanging words" and that "Bartlett's right hand was at roughly shoulder height within inches of Trooper Weight's face." The 5′9″, 240-pound Bartlett, who at the time of the incident was too intoxicated to drive, later maintained that his close proximity to Trooper Weight and loud voice were appropriate given the volume of music at the party, but Trooper Weight viewed Bartlett's "escalating voice, his look of anger, [and] his body language" as "hostile" "pre-assault indicators." To create a safe space for himself, Trooper Weight placed his open palms on Bartlett's chest and pushed him back.

Trooper Nieves, believing that Bartlett posed a danger to Weight, ran to help. Following a struggle, the troopers were able to subdue and arrest Bartlett.

He was released without injury after a few hours in the "drunk tank." Bartlett was charged with disorderly conduct and resisting arrest. The prosecution later dismissed the case for budgetary reasons, but the assigned prosecutor stated to the district court that he believed probable cause existed to charge Bartlett for disorderly conduct, resisting arrest, and assault.

Bartlett sued Troopers Weight and Nieves, asserting [among other things] false arrest and imprisonment ... [and] retaliatory arrest .... On the false arrest and imprisonment claims, the [district] court ruled there was probable cause to arrest Bartlett for harassment, so the officers were entitled to summary judgment. The court ruled that the existence of probable cause also barred respondent's First Amendment retaliatory-arrest claim, noting that this Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." ...

The Ninth Circuit affirmed on all claims except for retaliatory arrest. The appellate court ruled that the troopers had probable cause to arrest Bartlett for assault, disorderly conduct, harassment, and resisting arrest. Nevertheless, the court reiterated its earlier holding in *Ford v. City of Yakima,* 706 F.3d 1188, 1196 (9th Cir. 2013), that the existence of probable cause for an arrest does not bar a plaintiff's claim that the arrest was retaliatory in violation of the First Amendment. Pointing to respondent's allegation (uncorroborated by other witness testimony, audio or video recording) that Trooper Nieves said after the arrest, "Bet you wish you would have talked to me now," the court ruled that a jury might be persuaded that Bartlett was arrested for his earlier refusal to assist with the investigation, rather than for his harassing and belligerent conduct. The court thus reversed the grant of summary judgment on the retaliatory-arrest claim and remanded for trial....

“Supreme Court allows retaliatory arrest lawsuit to move forward”

The Washington Post

Robert Barnes

June 18, 2018

The Supreme Court on Monday gave a civic activist in Florida another shot at proving that his arrest at a city council meeting was in retaliation for his criticism of public officials.

The court said it was ruling narrowly for Fane Lozman, whose battles with the Riviera Beach City Council are legendary. It said a lower court had been wrong to stop his retaliation lawsuit.

Justice Anthony M. Kennedy, writing for the court, said a citizen’s ability to criticize government without fear of retribution ranks “high in the hierarchy of First Amendment values.”

But he wrote what even he described as a narrow ruling, sending the case back to a lower court and saying that Lozman will have to prove “the existence and enforcement of an official policy motivated by retaliation” on the part of the city council members.

The vote was 8 to 1, with Justice Clarence Thomas dissenting.

The court was particularly concerned about opening up individual police officers to lawsuits for making “split-second judgments” about whether an arrest is warranted, and it said this ruling did not affect that.

Lozman in an interview called the ruling a “really big day for citizen-activists” and said it makes clear that municipalities are not immune to the law. He said he would be willing to settle the case in exchange for an apology from the city council — now very different from the one he initially sued — and reimbursement for legal fees.

Lozman v. City of Riviera Beach grew from an attempt to cut off Lozman at a city council meeting into a major free-speech showdown.

During the public comments at a meeting in November 2006, Lozman was talking, as he often did, about political corruption. The presiding council member told him to stop, and he refused.

“Carry him out,” Elizabeth Wade told a police officer. Lozman was led away in handcuffs and spent hours in jail. The episode can be seen on YouTube. The court’s opinion included the link.

Lozman was charged with disorderly conduct and resisting arrest without violence. A state prosecutor declined to pursue the charges, however, saying a conviction was unlikely.

Lozman filed a civil rights lawsuit against the city, saying the council violated his First Amendment rights with a retaliatory arrest. A recording of a private meeting council members attended months earlier showed that they had agreed to teach Lozman a lesson.

But the U.S. Court of Appeals for the 11th Circuit, which covers Florida, Georgia and Alabama, said that if the government can demonstrate a reasonable belief that any law was broken — probable cause — the retaliation claim cannot go forward.

With disorderly conduct and resisting arrest out, prosecutors found an obscure Florida law that makes it a misdemeanor to interrupt or disturb "any school or any assembly of people met for the worship of God or for any lawful purpose."

It is possible that is what Lozman was about to do, the appeals court judge reasoned, and a jury agreed. Lozman's complaint could not go forward.

The Supreme Court years ago decided that a finding of probable cause barred a claim of retaliatory prosecution. So the question before the court was whether the same standard should be applied to arrests.

This was Lozman's second trip to the Supreme Court, a rarity when the cases present different questions of law.

The first time he and the city met at the high court, the justices reviewed his claim that Riviera Beach had improperly used federal admiralty law to seize (and later destroy) his two-story plywood houseboat, with French doors, moored at the city marina. The court ruled 7 to 2 against the city, saying that Lozman's houseboat was more house than boat and that admiralty law did not apply.

Both cases were *Lozman v. Riviera Beach*.

“South Florida Activist is 2-0 at the Supreme Court after First Amendment victory”

Miami Herald

Alex Daugherty

June 18, 2018

A South Florida man just won a First Amendment victory at the Supreme Court in a case that could protect disgruntled citizens from arrest for voicing their displeasure at elected officials during public meetings.

The nation's highest court ruled in favor of political gadfly Fane Lozman on Monday in a 8-1 decision, the culmination of more than a decade of work for Lozman after he was dragged out of a Riviera Beach city council meeting and arrested after speaking about the allegedly corrupt dealings of a Palm Beach County commissioner.

Lozman is now 2-0 at the Supreme Court, an accomplishment that his lawyer said is unprecedented for an individual plaintiff in a court that rejects around 7,000 cases every year and hears only 80. He also won a maritime law case related to his floating home in 2013.

"As far as I know he's the only person who's done it in recent times," said Pamela Karlan, an attorney from Stanford Law School who argued Lozman's case in front of the court. "There were people who got the same case twice to the Supreme Court, but not two different cases."

The court's decision on Monday affects citizens who show up to public meetings to vent and question the actions of elected officials. If one official orders the arrest of someone speaking at a public meeting and the rest of the elected body doesn't object, the person arrested can now have a cause of action against the municipality if he or she can prove animosity.

That means it's harder for angry elected officials to use their power to arrest people they simply don't like.

"It's just been an amazing effort to try to crack the overbreadth of government power towards citizens who want to exercise their First Amendment rights," Lozman said in an interview on Monday. "This arrest happened in 2006 and the case was filed in February 2008, so we've been fighting this case for over 10 years. It's been a Herculean effort."

This isn't Lozman's first time in front of the Supreme Court. The semi-retired South Florida stock trader-turned First Amendment crusader also won a Supreme Court case in 2012, when justices ruled 7-2 that Lozman's floating home was not a "vessel" and therefore not subject to the federal maritime

jurisdiction that eventually led local officials to seize and destroy it.

Lozman was already victorious in his fight against Riviera Beach that led to his arrest in the first place. He saved other people's homes from being taken via eminent domain for a new private marina in Riviera Beach, and he was able to keep the public marina out of private hands.

"I won the case today but I won what I really wanted years ago, which was the marina," Lozman said. "They didn't take the marina and the scum that tried to do that are out of power. We finally got the last one of those kicked out last month."

But while his fellow citizens were able to keep their boats and homes on the marina, Lozman became consumed with his First Amendment fight for people like him who are thrown out of public meetings for needling elected officials.

"I've heard horror stories from all over the country, people call me and they say they were physically thrown out of meetings. If you go on YouTube there's lots of people being dragged out by elected officials and I wanted to stop that," Lozman said, adding that he worked between 8,000 and 9,000 hours on his two Supreme Court cases.

Karlan said it was Lozman's idea to pursue the First Amendment case as a potential Supreme Court pick. He approached the Stanford lawyers with his plan after doing the research on his own.

"For years and years and years I'd work on these cases from 11 p.m. to 3 a.m., five days a week," Lozman said. "I taught myself the law. I think that this is almost like a kind of hobby, every night I kind of built the groundwork to have this case go to the next step. It became like building a boat, building this case."

The ruling in Lozman's favor was narrow in the sense that it applied to elected boards and municipalities who boot speakers from their meetings. There were also questions within the lawsuit about people arrested by police during events like protests who are not engaged in the act itself, such as journalists and bystanders. Those questions weren't part of the Supreme Court's decision.

"Basically, they made a distinction between individual police officers and the decision of the municipality," Lozman said. "We didn't have the facts (to make a broader First Amendment challenge). They gave it to us but they didn't give it to the media. I'm looking for a member of the media to move this issue forward."

Lozman said the ruling was a "dream come true" and that he was happy to win by a larger margin on Monday than in 2012. Clarence Thomas was the only justice to rule against Lozman.

"I'm thrilled, I'm glad [Justice Anthony] Kennedy voted for me this time," Lozman said. "Last time he dissented and I'm glad he came around."

Lozman said he will continue to advocate on First Amendment issues and is still fighting in the courts on who will pay for about $230,000 in legal fees.

But today was the culmination of 12 years of hard work.

"I just think my dream came true. I knew what happened to me was wrong and I never thought I'd have to go all the way to the Supreme Court to make things right," Lozman said.

"I helped move the bar forward on the First Amendment."

"Lozman v. City of Riviera Beach and First Amendment Retaliatory Arrest Damages Claims: The Court Again Sidesteps the Probable Cause Issue"

Nahmod Law Blog

Sheldon Nahmod

July 19, 2018

In *Lozman v. City of Riviera Beach,* 138 S. Ct. — (2018), the Supreme Court once again avoided ruling generally on the question whether a section 1983 plaintiff who alleges a retaliatory arrest in violation of the First Amendment must allege and prove the absence of probable cause in addition to impermissible First Amendment motive. Or, to put it another way, whether probable cause to arrest is a defense to a First Amendment retaliatory arrest damages claim. Instead, it ruled narrowly for the plaintiff based on the particular facts of his case.

In *Lozman,* the plaintiff alleged that a city (through its policymakers) had him arrested in retaliation for the exercise of his First Amendment rights. He claimed that he was arrested at a city council meeting when he got up to speak because he *previously* had criticized the city's eminent domain redevelopment efforts and had also sued the city for violating the state's Sunshine Act. He was never prosecuted. However, the plaintiff conceded that there was probable cause for his arrest for violating a Florida statute prohibiting interruptions or disturbances at certain public assemblies, because he had refused to leave the podium after receiving a lawful order to do so.

Ordinarily, such a plaintiff, in order to make out a section 1983 First Amendment *retaliatory arrest* claim, would only have to allege and prove that this impermissible retaliatory motive caused him harm, and the defendant would have the burden of *disproving* the absence of but-for causation in order to escape liability. *Mt. Healthy Bd. of Education v. Doyle*, 429 U.S. 274 (1977). But here the city argued that even if its motive was impermissible under the First Amendment, there was probable cause–an objective Fourth Amendment standard–to arrest the plaintiff anyway, and that *this constituted a defense to the plaintiff's First Amendment retaliation claim.*

In *Lozman,* the Eleventh Circuit had ruled that probable cause was indeed a defense to a section 1983 First Amendment retaliatory arrest claim. Specifically, it determined that a section 1983 retaliatory arrest plaintiff must allege and prove not only the retaliatory motive but the absence of probable cause as well. In other words, the absence of probable

cause was an element of the section 1983 plaintiff's retaliatory arrest claim.

The Eleventh Circuit's Reliance on *Hartman v. Moore*

The Eleventh Circuit's decision was based on the Supreme Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that for section 1983 *retaliatory prosecution* claims against law enforcement officers (prosecutors themselves are absolutely immune from damages liability for their decision to prosecute), the plaintiff must allege and prove not only the impermissible motive but the absence of probable cause as well. The Court reasoned that there was a presumption of prosecutorial regularity that the section 1983 plaintiff must overcome as an element of his retaliatory prosecution case. Accordingly, as a matter of section 1983 statutory interpretation and policy (but not of constitutional law), the plaintiff should have this twin burden in retaliatory prosecution cases.

The Court in *Hartman* explained that a *retaliatory prosecution* case was very different from the usual First Amendment retaliation case that involved a relatively clear causal connection between the defendant's impermissible motivation and the resulting injury to the plaintiff. It was appropriate in such cases to apply the *Mt. Healthy* burden-shift rule under which the defendant has the burden of *disproving* but-for causation in order to prevail.

As discussed in a prior post, the Court previously had a similar First Amendment retaliatory arrest issue before it in *Reichle v. Howards*, 566 U.S. 658 (2012). But it avoided addressing the merits by ruling for the individual defendants on qualified immunity grounds.

In my view, as I have argued previously, the Court's decision in *Hartman* should *not* be applied to First Amendment retaliatory arrest cases. The express reason for the *Hartman* rule is that First Amendment retaliatory prosecution cases involve a presumption of prosecutorial regularity. But this reason is clearly inapplicable where there is no prosecution and the constitutional challenge is to the arrest itself.

Moreover, First Amendment retaliatory arrest claims involve the impermissible motivation (a subjective inquiry) of law enforcement officers irrespective of probable cause, which is an objective (*could have* arrested) inquiry. Under this objective inquiry, the existence of probable cause precludes a Fourth Amendment violation based on an arrest even where that arrest is grounded on an offense different from the offense for which probable cause is deemed to be present. This provides a great deal of protection for police officers who allegedly make arrests in violation of the Fourth Amendment.

However, if a police officer arrests a person for racial reasons, and the claimed injury is grounded on those racial reasons, it should not matter for the Equal Protection claim–-even if it would for a Fourth Amendment claim–-that the officer had probable cause to do so, namely, that the officer *could*

have arrested the plaintiff. This reasoning should apply as well to §1983 First Amendment retaliatory arrest claims.

It was always questionable whether the Court in *Hartman* should have allowed policy considerations to change the usual section 1983 causation rules in First Amendment retaliatory prosecution cases. Regardless, that reasoning should most definitely not be extended to First Amendment retaliatory arrest cases. Such policy considerations as are discussed in *Hartman* are most appropriately addressed, if they are to be addressed at all, as part of the qualified immunity inquiry, *not* the elements of the section 1983 retaliatory arrest claim.

The Supreme Court's Narrow Decision in *Lozman*

In any event, in *Lozman,* the Court, in an opinion by Justice Kennedy, reversed the Eleventh Circuit and ruled that *in this particular case* the plaintiff did not have to allege and prove the absence of probable cause, and probable cause was not a defense to his First Amendment retaliatory arrest claim.

Emphasizing the narrowness of its decision, the Court pointed out that the plaintiff only challenged the lawfulness of his arrest under the First Amendment; he did not make an equal protection claim. Further, he conceded there was probable cause for his arrest, namely, that he *could have* been arrested for violating the Florida statute. Thus, the only question was whether the existence of probable cause barred his First Amendment retaliation claim in this case.

The Court went on to observe that the issue in First Amendment retaliatory arrest cases was whether *Mt. Healthy* or *Hartman* applied. It addressed what it considered to be the strong policy arguments on both sides of the issue. The Court then determined that resolution of the matter would have to wait for another case: "For Lozman's claim is far afield from the typical retaliatory arrest claims, and the difficulties that might arise if *Mt. Healthy* is applied to the same mine run of arrests made by police officers are not present here." For one thing, the plaintiff did not sue the officer who made the arrest. For another, since he sued the city, he had to allege and prove an official policy or custom, which "separates Lozman's claim from the typical retaliatory arrest claim." Moreover, the causation issues here were relatively straightforward because the plaintiff's allegations of an official policy or custom of retaliation were unrelated to the criminal offense for which the arrest was made but rather to prior, protected speech. In short, the causal connection between the alleged animus and the injury would not be "weakened by [an official's] legitimate consideration of speech."(quoting *Reichle*, 566 U.S. at 668).

This did not mean that the *Lozman* plaintiff would necessarily win on remand. A jury might find that the city did not have a retaliatory motive. Or, under *Mt. Healthy*, the city might show that it would have had the plaintiff arrested anyway regardless of any retaliatory motive.

Justice Thomas was the sole dissenter. He maintained that the Court had simply made up a narrow rule to fit this case. Instead, he argued that plaintiffs in First Amendment retaliatory arrest cases have the burden of pleading and proving the absence of probable cause. That is, probable cause "necessarily defeats First Amendment retaliatory-arrest claims." Accordingly, the plaintiff should lose here.

Comments

The better approach, as indicated above, is to apply *Mt. Healthy* in all retaliatory arrest cases. *Hartman* should be limited to retaliatory prosecution cases. Nevertheless, after *Lozman* the question is still open in the Supreme Court. This means, among other things, the retaliatory arrest individual defendants will continue to have a powerful qualified immunity argument, namely, that the law is not clearly settled even now, per *Reichle v. Howards*.

Note, however, that the Court may yet resolve this question in its forthcoming 2018 Term. On June 28, 2018, it granted certiorari in *Nieves v. Bartlett*, 712 Fed.Appx. 613 (9th Cir. 2017)(No.17-1174), to address once again whether probable cause is a defense to a section 1983 First Amendment retaliatory arrest claim. In this unreported decision, the Ninth Circuit ruled that probable cause is *not* a defense to First Amendment retaliatory arrest damages claims.

“Fane Lozman Goes to the Supreme Court, Again”

The New Yorker

Jeffrey Toobin

March 2, 2018

It’s mostly a myth that scrappy outsiders often find a way to take their cases “all the way to the Supreme Court.” Government, big business, and criminal matters dominate the Justices’ docket. On the other hand, there is Fane Lozman, a man often referred to as a civic gadfly, from Riviera Beach, Florida. He’s managed to get a case before the Supreme Court—two of them, actually.

Lozman’s legal odyssey began when he set up an unusual housekeeping arrangement, in 2002. A former marine and financial trader who is now fifty-six years old, Lozman built a floating home, sixty feet long by twelve feet wide. “The home consisted of a house-like plywood structure with French doors on three sides,” a Supreme Court opinion later described it. “It contained a sitting room, bedroom, closet, bathroom, and kitchen, along with a stairway leading to a second level with office space. An empty bilge space underneath the main floor kept it afloat.” Lozman had his residence towed to various marinas in Florida, until he settled, in 2006, in Riviera Beach, which is in tony Palm Beach County. At the time, the city was hoping to redevelop its marina, and Lozman didn’t want to relocate. A nasty fight ensued, and the city ultimately took possession of the home and later destroyed it.

The original dispute turned on a fairly obscure point of admiralty law: whether Lozman’s home fit the definition of a “vessel”—specifically, whether it was “capable of being used . . . as a means of transportation on water.” Lozman had originally represented himself in the dispute, but he recruited lawyers and students at Stanford Law School’s Supreme Court clinic to take on his case, and they ultimately won it, 7–2, in 2013. According to Justice Stephen Breyer’s opinion, “Nothing about Lozman’s home suggests that it was designed to any practical degree to transport persons or things over water.” It had no ability to propel itself, and its French doors were not watertight. So, in the convoluted way of the case, because Lozman’s home was not a vessel, the city couldn’t seize it, and he wound up staying where he was.

While Lozman’s first case was working its way through the courts, his battles with the Riviera Beach City Council continued. The Council still wanted to develop the marina area, and planned to take it by eminent domain. But the Florida legislature had passed a law banning the use of eminent domain where the property was to be used by a private developer—as was the plan in Riviera Beach. So the Council called a surprise meeting and approved the plan on the day before the new law went into effect.

Lozman sued, arguing that the public didn't receive sufficient advance notice of the meeting. The city ultimately dropped its redevelopment plan, but not its efforts to boot Lozman from his boat.

In the midst of these struggles, on November 15, 2006, the City Council held a meeting that included, as was customary, a period for open comment, when citizens could address the Council on issues of their choice for three minutes apiece. Lozman began speaking about municipal corruption, and, within a few seconds, a Council member told a police officer to "carry him out." While a video camera rolled, Lozman was then arrested, handcuffed, and taken to a holding cell at the local police station. He was later released, and no charges were filed, but Lozman sued the city for violation of his First Amendment rights. It was this case that wound up before the Supreme Court on Tuesday morning.

Lozman had an unusual problem before the Justices: his case was too good. Every Justice who spoke seemed to acknowledge that Lozman's rights had been violated. As Chief Justice John Roberts put it, "I found the video pretty chilling. I mean, the fellow is up there for about fifteen seconds, and the next thing he knows he's being led off in handcuffs, speaking in a very calm voice the whole time. Now, the Council may not have liked what he was talking about, but that doesn't mean they get to cuff him and lead him out." Still, several Justices worried that the egregious facts of Lozman's case might lead them to create a standard that would subject many communities to similar lawsuits. They needed to figure out how to create a standard that would not discourage law enforcement from keeping order in public meetings, while preventing the kind of abuse that Lozman suffered. "I'm very concerned about police officers in difficult situations," Justice Anthony Kennedy told Pamela Karlan, a Stanford Law professor who was representing Lozman. "In this case, there's a very serious contention that people in elected office deliberately wanted to intimidate this person, and it seems to me that maybe in this case we should cordon off or box off what happened here from the ordinary conduct of police officers."

After the arguments, the outcome of the case seemed in doubt, but Lozman was serene as he held court on the marble steps of the Supreme Court building. (He's a veteran of such moments, after all.) Standing a regal six feet four inches, and wearing a well-cut black suit, Lozman said that he was looking forward to returning to Florida. "I just want to enjoy the fruits of my labor," he said. But there was one more business venture on his mind. "I'm planning on building a modernistic stilt-home community on the water," he said. Who could object to that?

"Argument preview: Justices to consider whether probable cause defeats claims of retaliatory arrest for First-Amendment-protected expression"

SCOTUS Blog

Heidi Kitrosser

February 21, 2018

On November 15, 2006, Fane Lozman rose to speak during the public-comments portion of a regular public meeting of the City Council of Riviera Beach, Florida. What followed was anything but a run-of-the-mill discussion about the intricacies of local government. To the contrary, when Lozman began to talk about "corrupt local politician[s]," he was cut off by a councilperson and asked to cease that line of commentary. When Lozman refused to comply, he was arrested, handcuffed and removed from the meeting.

In February 2008, Lozman filed a Section 1983 suit against Riviera Beach in the U.S. District Court for the Southern District of Florida. He alleged, among other things, that his arrest constituted retaliation for First-Amendment–protected activity. Specifically, Lozman charged that his arrest amounted to payback for two categories of protected expression: his then-pending lawsuit against the city under Florida's Sunshine Act, and his extensive public criticisms of city officials and policies, including and preceding his remarks on November 15.

After a jury returned a verdict for the city, Lozman sought a new trial, which the district court denied, and he filed an unsuccessful appeal to the U.S. Court of Appeals for the 11th Circuit. The 11th Circuit acknowledged Lozman's "compelling" argument that the district court had given erroneous jury instructions on retaliatory animus. The court of appeals held, however, that any such error was harmless, because the jury had found that the arresting officer had probable cause to arrest Lozman. The court relied on an earlier 11th Circuit case, *Dahl v. Holley*, which held that a plaintiff cannot prevail on a First Amendment retaliatory arrest claim if there was probable cause to justify the arrest.

On Tuesday, February 27, the Supreme Court will consider whether the 11th Circuit was correct in holding that the presence of probable cause necessarily defeats a claim of retaliatory arrest for First-Amendment-protected expression. In 2006, in *Hartman v. Moore*, the Supreme Court held that probable cause bars First Amendment claims alleging retaliatory prosecution. The court has yet to determine, however, whether to extend the *Hartman* rule (the "probable-cause bar") to the retaliatory-arrest setting. Although the 2012 case *Reichle v. Howards* presented that very question, the court resolved *Reichle* on the narrower grounds of qualified immunity. Currently, the federal courts of appeals are split on the issue.

In urging the Supreme Court not to extend the probable-cause bar to retaliatory-arrest claims, Lozman argues that there are key distinctions between the prosecution and arrest settings. In this vein, he characterizes *Hartman* as having "rest[ed] entirely on the fact that prosecutors … are absolutely immune from suit." Given this immunity, a retaliatory-prosecution claim necessarily entails a representation that a non-prosecuting official induced a prosecutor to conduct a prosecution for retaliatory reasons. To prevail in such a case, when there is probable cause to support the grounds officially given for prosecution, a plaintiff must demonstrate that the official grounds are distinct from the prosecutor's subjective, retaliatory motives. Such a showing necessarily entails a complicated causal chain. More importantly, the process of identifying and litigating over that chain undermines the prosecutorial independence and corollary "'presumption of [prosecutorial] regularity'" that immunity is meant to protect. In contrast, Lozman maintains, the causal chain is relatively "straightforward" in the retaliatory-arrest setting. Additionally, he posits that "no potentially responsible actor" in that setting is beyond scrutiny.

Lozman also argues that a probable-cause bar poses far greater risks to First Amendment interests in the retaliatory-arrest context than in the retaliatory-prosecution context. In the prosecution setting, "the putative plaintiff will have an indictment or charging instrument that cabins the probable cause inquiry by identifying a specific crime." Yet "in retaliation cases involving *arrests*, the 'subjective reason for making the arrest need not,'" under *Devenpeck v. Alford*, "'be the criminal offense as to which the known facts provide probable cause.'" A probable-cause bar in the arrest setting thus immunizes state actors who cause arrests to be made in retaliation for protected speech, so long as they can show that there was probable cause to arrest the speaker for jaywalking, speeding, disturbing the peace or committing any criminal violation at all.

To illustrate the potential for abuse, Lozman points to the facts of his own case. Shortly after his arrest, Lozman was given a "notice to appear" that listed two charges: "disorderly conduct" and "resisting arrest without violence." Both charges were soon dismissed by the state's attorney, who found "no reasonable likelihood" that they could be prosecuted with success. At the trial in Lozman's Section 1983 suit, the question resurfaced as to whether there had been probable cause to arrest him for a crime. The trial court judge concluded that no probable cause had existed to arrest him for either charging offense. The city then "identified two new candidates" for provisions that Lozman might have violated: a prohibition on "'trespass after warning'" and a law against "'willfully interrupt[ing] or disturb[ing] any school or any assembly of people met for the worship of God or for any lawful purpose.'" After initially leaning toward the trespass provision, the district court settled on the willful-disturbance law as the one "at play here." Ultimately, the latter offense was the only one "as to which the jury was asked to assess probable cause."

For its part, the city denies that there are meaningful, material distinctions between the retaliatory-arrest and retaliatory-prosecution settings. It maintains that each type of claim presents the same fundamental causality problem: "[S]omething other than [retaliatory] animus – the prosecutor's independent decision to prosecute, or the officer's decision to arrest for reasons unrelated to animus toward the arrestee's speech – may have led to the supposed retaliatory action." Nor do retaliatory arrests threaten free-speech interests any more than do retaliatory prosecutions. If anything, the opposite is true, because a "criminal prosecution is a far greater intrusion on a defendant's liberty than an arrest." The city also dismisses the notion that the arrest setting is comparatively rife with the potential for government abuse of the probable-cause bar. "Rarely," the city notes, "is an officer who harbors some ill will towards a speaker present at the exact moment the speaker does something that gives probable cause for an arrest." And in any event, "arrests backed by probable cause pose little danger to the freedom of speech." Far greater threats are posed by "arrests unsupported by probable cause."

The city also stresses the practical value of the probable-cause bar in the retaliatory-arrest setting. The city observes that "officers must *often* consider protected speech when deciding whether to make an arrest." For example, speech might "provide 'evidence of a crime.'" Or it might influence an officer's assessment of whether a suspect threatens public safety. With a probable-cause bar in place, officers can "make arrests in such circumstances without fear of having to later litigate whether their *real* motivation was preventing [crime] or punishing speech." To illustrate this point, the city highlights the example of the U.S. Court of Appeals for the 9th Circuit, which does not impose a probable-cause bar. The city summarizes a number of retaliatory-arrest cases that went to trial in the 9th Circuit, and suggests that they lacked merit.

Among the questions to watch for from the justices are those designed to tease out the practical dangers each party's position might pose. For example, the city might be asked to grapple with scenarios in which government officers intentionally and openly retaliate against protestors for their protected speech by targeting those people for aggressive enforcement of laws against minor transgressions, such as jaywalking. Lozman's attorney might be pushed, on the other hand, to consider the limits of a complainant's ability to state a claim for retaliatory arrest based on speech that is protected but that may show violent impulses on the speaker's part. It will be interesting as well to see to what extent, if at all, the justices' questions reflect recent events, such as the demonstrations and violence in Charlottesville, Virginia, protests against President Donald Trump's administration, and protests by Black Lives Matter. And of course, we can count on old First Amendment chestnuts like the chilling effect and the heightened value of "core" political speech to crop up throughout the discussion.

"Supreme Court Could Continue First Amendment Charge"

Bloomberg Law

Kimberly Robinson

August 8, 2018

The U.S. Supreme Court has seemingly taken it easy on free speech cases after last term's First Amendment bonanza.

OT 2017—as last term is known by court watchers—had five cases that touched on free speech, all of which were high-profile.

The most explosive was *Janus v. AFSCME*, in which Justice Elena Kagan accused the 5-4 majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."

She warned of a future in which "black-robed rulers" would override citizens' choices.

Decisions like *Janus* "invite conservative legal activists to keep pushing far-reaching First Amendment claims," David Gans, of the progressive Constitution Accountability Center, Washington, told Bloomberg Law.

"There are not any cases involving such claims on the Court's docket for next Term so far," Gans said.

But there are some waiting in the wings.

And in "the years to come, we are likely to see a new suite of First Amendment claims in the context of unions and labor law, disclosure, and campaign finance," Gans said.

Next Term

Nearly 10 percent of the court's docket last term touched on the First Amendment, but so far next term has only one. And the issue is strikingly similar to one the court heard last term, *Lozman v. City of Riviera Beach*.

At issue in *Nieves v. Bartlett* is whether probable cause defeats a First Amendment retaliatory claim. That's nearly identical to the question presented in *Lozman*.

But the court stressed in *Lozman* that the inquiry was very fact specific. So *Nieves* doesn't seem like it will break a lot of new First Amendment ground.

There are, however, other hot-button speech cases waiting to be granted by the justices.

Those include:

- *Cosby v. Dickinson*, a defamation case against actor Bill Cosby related to rape allegations;
- *Keister v. Bell*, about permitting requirements for campus speech; and
- *Kennedy v. Bremerton Sch. Dist.*, asking what kind of free speech rights

> teachers and coaches have while around students. The speech at issue in *Kennedy* involves a coach's prayers—in the presence of students—before high school football games.

Compulsory Bar Membership

None of those free speech cases, however, would have the implications threatened by Kagan: slicing down popular legislation via a robust reading of the First Amendment.

But two cases pending before the court have that potential.

Fleck v. Wetch is a challenge to North Dakota's mandatory bar association requirement for attorneys. Similar to the argument in *Janus*, the petitioner there says that he can't be compelled to subsidize speech he disagrees with.

The Supreme Court previously held that compulsory bar membership could be squared with the First Amendment if the "expenditures are necessarily reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services."

The petitioner argues that the First Amendment landscape has shifted and that the court's previous ruling should be overruled.

Net Neutrality

The Supreme Court also has before it a series of cases regarding the Federal Communication Commission's now-defunct net neutrality rules.

Under the Obama administration, the FCC issued an order requiring internet service providers to treat all information the same regardless of the source.

The D.C. Circuit rejected a challenge to that order in 2016.

In refusing to reconsider that decision in front of the full D.C. Circuit back in 2017, the court rejected the suggestion that the First Amendment barred such regulation of internet service providers. Judge Brett Kavanaugh, who President Donald Trump has nominated to the Supreme Court, dissented from the decision not to rehear the case, saying that the First Amendment "bars the Government from restricting the editorial discretion of Internet service providers."

A finding in line with Kavanaugh's view would arm internet service providers "with a First Amendment shield against net neutrality obligations," Judge Sri Srinivasan said.

Several parties petitioned the Supreme Court for review in 2017. But the cases have stalled in the high court, likely due to political developments.

The FCC under the Trump repealed the net neutrality rules in late 2017, and the repeal went into effect in June.

The federal government Aug. 2 asked the high court to vacate the lower court's ruling as a result.

In May, however, the Senate voted 52-47 to overturn the FCC's repeal in a resolution under the Congressional Review Act. The

resolution is waiting on action in the U.S. House of Representatives.

Should net neutrality supporters succeed in their uphill battle to get the CRA passed in the House, all eyes would turn to the Supreme Court.